

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**ORIGINAL**

FLORIDA CABLE  
TELECOMMUNICATIONS ASSOCIATION,  
INC., COX COMMUNICATIONS GULF  
COAST, L.L.C., *et. al.*

*Complainants,*

v.

GULF POWER COMPANY,

*Respondent.*

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Federal Communications Commission  
Office of Secretary

E.B. Docket No. 04-381

To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel  
Chief Administrative Law Judge

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**COMPLAINANTS' OPPOSITION TO RESPONDENT  
GULF POWER COMPANY'S MOTION TO STRIKE**

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. ("Complainants"), by undersigned counsel, respectfully submit this Opposition to Respondent Gulf Power Company's ("Gulf Power" or "Respondent") Motion to Strike Complainants' Petition for Clarification ("Motion to Strike").<sup>1</sup>

Respondent does not seriously challenge Complainants' Petition for Clarification, preferring instead to characterize it as "premature, redundant, or both," and assert that Complainants are "recycling" arguments presented to the Enforcement Bureau in their response to Gulf Power's

<sup>1</sup> Complainants' Petition for Clarification ("Petition") was filed and served on October 20, 2004. Respondent's Opposition would have been due October 26<sup>th</sup> pursuant to 47 C.F.R. § 1.294. Respondent did not file its Motion to Strike until November 4<sup>th</sup>. To the extent that Respondent's Motion to Strike is an opposition to the Petition for Clarification, it is untimely.

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Description of Evidence.<sup>2</sup> Respondent also makes the confusing but nonetheless scandalous assertion that Complainants are “poisoning the well.”<sup>3</sup> Indeed, there are no grounds to strike Complainants’ Petition because – as Respondents themselves concede – clarification is appropriately addressed at the pre-hearing conference, pursuant to 47 C.F.R. § 1.248(c)(1).<sup>4</sup> Respondent’s motion is therefore nothing more than a distraction and should be summarily denied.

First, Gulf Power’s claim that the Petition for Clarification conflicts with the *Hearing Designation Order*<sup>5</sup> and seeks to redefine the scope of the proceeding is off the mark.<sup>6</sup> The Bureau did not reject or resolve Complainants’ arguments with respect to the issues implicated by Gulf Power’s description of proposed evidence; rather, it designated the matter for hearing in order to assess whether Gulf Power is entitled to recover more than marginal costs for any of Complainants’ attachments pursuant to the specifics of the test set forth in *Alabama Power Co. v. FCC*.<sup>7</sup> Moreover, Gulf Power does not dispute that the issues identified in the Petition for Clarification are part of the test established in *Alabama Power* and appears to object only to the “linear, step-by-step approach” Complainants identified.<sup>8</sup>

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<sup>2</sup> Motion to Strike at 1-2.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Florida Cable Telecommunications Ass’n, Inc., et al. v. Gulf Power Co.*, Hearing Designation Order, EB Docket No. 04-381, DA 04-3048 (rel. Sept. 27, 2004) (hereinafter “*Hearing Designation Order*”).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> 311 F.3d 1357, 1370-71 (11<sup>th</sup> Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (hereinafter “*Alabama Power*”). See *Hearing Designation Order* at ¶¶ 3-5.

<sup>8</sup> Motion to Strike at 4. The “linear” issues identified by Complainants include: (1) a definition and interpretation of the ambiguous statutory term “insufficient capacity” and its parameters; (2) an application of precedent determining that “insufficient capacity” exists only “when it is agreed” by the parties; (3) a definition and comparison of the terms “full capacity” and “crowding” on poles; (4) an application of the Commission’s requirement for a reasonable and specific bona fide development plan for any reservation of space on any particular pole by Gulf Power; (5) a determination of the relevance of prior voluntary and contractual pole change-outs performed by Gulf Power; and (6) a finding of the extent to which the Cable Formula already provides Gulf Power with adequate compensation in excess of marginal costs. Gulf Power is free to propose a different order or structure.

Second, Gulf Power restates its earlier argument that the change from “voluntary access” to “mandatory access” was not “a mere technicality,” although there has been no change in Complainant’s attachments to Gulf Power’s poles or the nature of the space occupied.<sup>9</sup> Nonetheless, Gulf Power seeks a substantial increase in rates it charges for Complainants’ attachments and has used the Eleventh Circuit’s test as the basis for submitting evidence that it is entitled to more than marginal costs. Gulf Power’s Motion to Strike, however, seems to argue that it may put on evidence of something other than what the Eleventh Circuit described in *Alabama Power* and what the Bureau said in its *Hearing Designation Order*, erroneously claiming that the Cable Rate itself must be the floor for just compensation, not marginal costs.<sup>10</sup> Whatever Respondent’s argument may be, the floor is marginal costs; the issues that Complainants identified in their Petition for Clarification relate to the determination whether, and only then in what amount, Gulf Power is entitled to more than marginal costs. Gulf Power’s misstatements underscore the need for clarification of the issues to be resolved in this proceeding.

Complainants have not asked to enlarge, change or delete issues in the *Hearing Designation Order*, nor have they asked for a summary decision. Instead, Complainants have requested a clarification so that the procedural orders entered to date properly reflect the issues governing just compensation set forth in both the *Hearing Designation Order* and *Alabama Power*.

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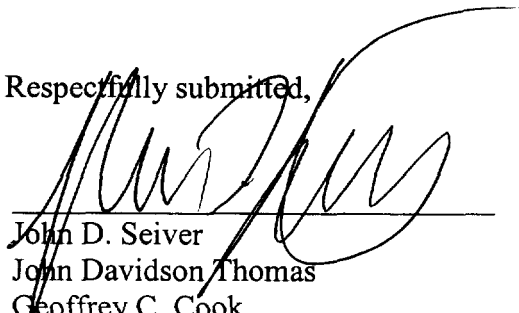
<sup>9</sup> Compare Motion to Strike at 2 with Petition for Clarification at 3-4, 5.

<sup>10</sup> Compare Motion to Strike at 4 (“It is hard to believe that the Enforcement Bureau would have granted Gulf Power’s request for evidentiary hearing if Gulf Power was not entitled to recover more than the Cable Rate under any circumstances.” with *Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11<sup>th</sup> Cir. 1999) (“We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the [utility’s] view, constitutionally inadequate under the current Act for forced access situations. *Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.*”) (emphasis added).

**WHEREFORE**, for the forgoing reasons, Complainants respectfully request that Gulf Power's Motion to Strike be denied and that Complainants' Petition for Clarification be granted.

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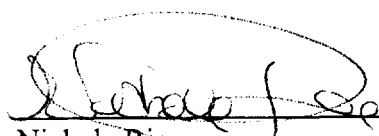
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ASSOCIATION, COX  
COMMUNICATIONS GULF  
COAST, L.L.C., COMCAST  
CABLEVISION OF PANAMA  
CITY, INC., MEDIACOM  
SOUTHEAST, L.L.C., and  
BRIGHT HOUSE NETWORKS,  
L.L.C.**

November 10, 2004

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainants' Opposition to Respondent Gulf Power Company's Motion to Strike has been served upon the following by telecopier and U.S. Mail on this the 10<sup>th</sup> day of November, 2004:

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